MR Properties Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — TAX APPEAL NO R1–14–14 OF 1996
RAUS SHARIF J
7 SEPTEMBER 2004

Revenue Law — Income tax — Assessment of — Taxpayer carried on business as property developer — Land sold by taxpayer — Whether proceeds of sale subject to income tax or real property gains tax — Whether Inland Revenue could revise earlier assessment of real property gains tax on sale proceeds to an assessment under income tax

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The appellant carried on business as a property developer. In 1984 it acquired several acres of land ('the acquired land') in Ulu Langat, Selangor. In 1990, the appellant sold off several parts of the acquired land. By a notice of assessment dated 2 May, 1992, the respondent assessed real property gains tax under the Real Property Gains Tax Act 1976 (RPGT) on the sale of the land in the sum of RM1,080,768.48. This tax was paid by the appellant in 1992. Subsequently, the appellant was informed by the respondent that the sale transaction should be subjected to income tax, and not real property gains tax. Accordingly, through a notice of assessment dated 9 August 1993, the respondent raised an assessment to income tax for year of assessment 1991 in the sum of RM4,220,064.26. The appellant filed a notice of appeal against the assessment to income tax to the Special Commissioners. The Special Commissioners decided in favour of the respondent. Hence, the appellant appealed to the High Court. The two issues for the High Court's determination were: (1) whether an assessment could be raised under the Income Tax Act ('ITA') to replace an assessment raised earlier under the RPGT; and (2) whether the proceeds from the sale of the land constituted capital gain or income.

Held, dismissing the appeal with costs:

(1) Under the scheme of taxation in Malaysia, there is no possibility of an overlap between tax payable under the ITA and RPGT. The RPGT is only levied in a situation where the ITA is not applicable. It is not possible for a taxpayer to be liable to both taxes in respect of the same gain (see para 11).

(2) The respondent was not precluded from raising the assessment under ITA after reviewing the earlier assessment made under the RPGT. The respondent was empowered to review or revise an assessment. This

power would include vacating an assessment on the ground that no real property gain tax was payable on the gains. Thus, where an assessment for RPGT was made and subsequently it was discovered that there was no chargeable gain within the meaning of the RPGT and thus no real property gain tax is payable, the respondent can and must discharge the assessment. In the instant case, the respondent after imposing tax on the appellant under RPGT discovered that the sale of the subject lands should be subjected to ITA and informed the appellant accordingly. Thus, the assessment to income tax by the respondent was not in law null and void (see para 14).

(3) The Special Commissioners had clearly given their reasons why they considered the appellant to be a property developer and a dealer in land and how the sold land formed part of the appellant's stock in trade, the disposal of such land being part of the appellant's normal business activity and thus chargeable to ITA and not RGPT. There was no mistake of law made by the Special Commissioners which justified the reversal of their decision by the High Court (see para 16).

[**Bahasa Malaysia summary**

Perayu menjalankan perniagaan sebagai pemaju hartanah. Pada tahun 1984 perayu mendapat beberapa ekar tanah ('tanah tersebut') di Ulu Langat, Selangor. Pada 1990, perayu telah menjual beberapa bahagian tanah tersebut. Melalui satu notis penilaian bertarikh 2 Mei 1992, responden telah menilai cukai keuntungan hartanah di bawah Akta Cukai Keuntungan Harta Tanah 1976 ('RPGT') ke atas jualan tanah tersebut yang berjumlah RM1,080,768.48. Cukai ini telah dibayar oleh perayu pada 1992. Kemudiannya, perayu telah dimaklumkan oleh responden bahawa transaksi jualan tersebut sepatutnya dikenakan cukai pendapatan, dan bukannya cukai keuntungan hartanah. Berikutan dengan itu, melalui notis penilaian bertarikh 9 Ogos 1993, responden telah membuat penilaian bagi cukai pendapatan bagi tahun penilaian 1991 pada jumlah RM4,220,064. Perayu telah memfailkan notis rayuan terhadap penilaian ke atas cukai pendapatan tersebut kepada Pesuruhjaya Khas. Pesuruhjaya Khas membuat keputusan yang berpihak kepada responden. Oleh itu, perayu merayu ke Mahkamah Tinggi. Dua isu yang perlu ditentukan oleh Mahkamah Tinggi adalah: (1) sama ada penilaian boleh dibuat di bawah Akta Cukai Pendapatan ('ITA') untuk menggantikan penilaian yang dibuat terdahulu di bawah RPGT; dan (2) sama ada keuntungan daripada hasil jualan tanah tersebut merupakan keuntungan modal atau keuntungan pendapatan.

Diputuskan, menolak rayuan dengan kos:

(1) Di bawah skim percukaian di Malaysia, tidak terdapat kemungkinan berlakunya pertindihan di antara cukai yang perlu dibayar di bawah ITA

dan RPGT. RPGT hanya dikenakan dalam situasi di mana ITA tidak terpakai. Adalah tidak mungkin bagi seseorang pembayar cukai untuk perlu membayar kedua-dua cukai bagi pendapatan yang sama (lihat perenggan 11).

(2) Responden tidak dihalang daripada membuat penilaian di bawah ITA setelah menilai penilaian terdahulu yang dibuat di bawah RPGT. Responden diberi kuasa untuk menilai semula atau menyemak sesuatu penilaian. Kuasa ini termasuk membatalkan sesuatu penilaian atas dasar bahawa tiada cukai keuntungan hartanah perlu dibayar bagi pendapatan tersebut. Oleh itu, di mana penilaian bagi RPGT telah dibuat dan kemudiannya didapati bahawa tiada keuntungan yang boleh dikenakan mengikut tafsiran RPGT dan oleh itu tiada cukai keuntungan hartanah yang perlu dibayar, responden boleh dan perlu membatalkan penilaian tersebut. Dalam kes ini, responden setelah mengenakan cukai ke atas perayu di bawah RPGT telah mengetahui bahawa jualan tanah tersebut perlu dikenakan cukai di bawah ITA dan telah memaklumkan perayu mengenainya. Oleh itu, penilaian terhadap cukai pendapatan oleh responden bukan terbatal dan tidak sah (lihat perenggan 14).

(3) Pesuruhjaya Khas telah dengan jelasnya memberikan alasan mereka kenapa mereka menganggap perayu sebagai pemaju hartanah dan peniaga hartanah dan bagaimana tanah yang dijual membentuk sebahagian daripada peralatan perniagaannya, dan jualan tanah tersebut merupakan sebahagian daripada aktiviti perniagaan biasa bagi perayu dan oleh itu tertakluk kepada ITA dan bukannya RPGT. Tiada kesalahan dari segi undang-undang yang telah dilakukan oleh Pesuruhjaya Khas yang boleh memberi justifikasi bagi Mahkamah Tinggi untuk menukar keputusannya (lihat perenggan 16).]

Notes

For cases on assessment of income tax, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2072–2095.

For cases on assessment of real property gain tax, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2395–2396.

Cases referred to

Bird and others v Inland Revenue Commissioners and related appeals [1988] STC 312 (refd)

Bye (Inspector of Taxes) v Coren [1988] STC 393 (refd)

E v Comptroller-General of Inland Revenue [1970] 2 MLJ 117 (refd)

Garvin v Inland Revenue Commissioners and related appeals [1981] STC 344 (refd)

Mount Elizabeth (Pte) Ltd v CIR [1987] 2 MLJ 130 (refd)

NYF Realty Sdn Bhd v DGIR [1974] 1 MLJ 182 (refd)

Leeming v Jones 15 TC 333 (refd)

Legislation referred to

Income Tax Act 1967 Schedule 5, para 4
Real Property Gains Tax Act 1976

James CY Loh (James CY Loh & Co) for the appellant.
Hazlina Hussain (Normaliza with her) (Inland Revenue Board) for the respondent.

Raus Sharif J:

APPEAL

[1] This is an appeal by MR properties Sdn Bhd (the appellant) by way of a case stated against the deciding order of the Special Commissioner of Income Tax (the Special Commissioners) pursuant to paragraph 34 of Schedule 5 of the Income Tax Act 1967 (the ITA). In the deciding order dated 28 February 1996, the Special Commissioners dismissed the appellant's appeal and confirmed the assessment dated 9 August 1993 for the year of assessment 1991 in the sum of RM4,220,064.26 raised by the Director General of Inland Revenue (the respondent) under the ITA.

FACTS

[2] The appellant was incorporated in Malaysia on 19 May 1982 with a paid up capital of RM2, and is carrying on the business of a property developer having its registered office at third floor, Balai Berita, No 36, Jalan Riong, 59100 Kuala Lumpur. On 10 April 1984, the appellant acquired 589.309 acres of land in the districts of Ulu Langat, Selangor (the acquired land) for a sum of RM18,899,870. By a sale and purchase agreement dated 10 August 1990, the appellant sold part of the acquired land, comprising of Lot No 32 (Grant 27675 Mukim Semenyih) Lot 1917 (CT 15906 Mukim Semenyih), Lot 1966 (grant 5757 Mukim Kajang) Lot 3178 (CT 6326 Mukim of Kajang) and Lot PT 11749 (HS (D) 1635 Mukim of Kajang (the subject lands) to Datwin (M) Sdn Bhd for RM29,383,680. The subject lands occupied about 368 acres on six continuous lots.

[3] By a notice of assessment dated 2 May 1992, the respondent had raised an assessment to real property gains tax under Real Property Gain Tax Act 1976 (RPGT) on the disposal of the subject lands in the sum of RM1,080,768.48 which was paid by the appellant partly on 29 May 1992 and the balance on 4 June 1992.

[4] Subsequently, the appellant was informed by the respondent that the transaction should be subjected to income tax, and not real property gains tax. Accordingly, through a notice of assessment dated 9 August 1993, the respondent raised an assessment to income tax for year of assessment 1991 in the sum of RM4,220,064.26. The appellant, being dissatisfied with the

decision of the respondent filed a notice of appeal against the assessment to income tax to the Special Commissioners. The Special Commissioners decided in favour of the respondent. Hence, this appeal by the appellant.

ISSUES AND FINDINGS

[5] Basically, there are two issues raised by the appellant in this appeal, namely:

(1) Whether an assessment can be raised under ITA to replace an assessment raised earlier under the RPGT; and

(2) Whether the proceeds from the sale of the subject lands constitute a capital gain or income.

[6] In fact, the above two issues were the same issues raised by the appellant before the Special Commissioners.

ISSUE NO 1

[7] It is contended by the learned counsel for the appellant Mr James Low, that the assessment to income tax by the respondent is in law null and void because of the following:

(1) It is in law inconsistent with and subsequent to an earlier assessment to real property tax of RM1,080,768.48 which the appellant had settled in 1992;

(2) There is a presumption in tax law against double taxation in respect of the same transaction.

(3) There should be finality as to the tax liability.

[8] In short, the argument by the learned counsel for the appellant is that there is no statutory power for the respondent to 'vacate' an assessment under RPGT and then having done so, to switch to another assessment under the ITA. According to the learned counsel, that the act of the respondent to switch from one Act to another would result to no finality to tax liability and there is a presumption in tax law against double taxation in respect of the same transaction.

[9] To support his argument, the learned counsel for the appellant referred to a number of English cases in particular two Houses of Lords cases of *Garvin v Inland Revenue Commissioners and related appeals* [1981] STC 344 and *Bird and others v Inland Revenue Commissions and related appeals* [1988] STC 312.

[10] The Special Commissioners, as can be seen in the case stated, dealt with the two cases as follows:

What clearly emerged from *Bird* and *Garvin* is strong judicial misappropriation of double taxation. We wholeheartedly agree with the sagacious view of the House of Lord. As Lord Keith said in Garvin, it is not open to the Revenue to subject a taxpayer to two different charges of tax in respect of the same receipts. As Lord Wilberforce said in Bird, the relevant laws were drafted without regard to possible accumulation of these two taxes. The speech in *Garvin* clearly indicate that on the law as it stood in England taxes may be validly imposed under both provision of the law for the same transaction. In referring to the *Bird* decision, *Whiteman on Income Tax* (3rd Ed) said at p 1089:

> 'Thus, it is possible that prior to that decision the Inland Revenue may have raised both a capital gains tax assessment (which has been paid) and an income tax assessment under s 703 in a particular case.'

It was this laxity in the English law that made it possible for the Revenue to impose both the taxes that caused the House of Lords to ventilate its feeling against double taxation in England which was a lawful possibility at that time. Inthis regard reference may be made to the speech of Lord Russell of Killoween when he said that the capital gains tax which has been levied and paid '… remains perfectly valid.' It is because of this that there was confusion in England.

In Malaysia the relevant laws are specific in their application. The Income Tax Act 1967 applies only to income and Real Property Gain Tax Act 1976 applies only to capital gains on real property. Thus, the question of subjecting a taxpayer to both the taxes in respect of the same receipt cannot arise, as in England. The corollary is that any attempt by the respondent to impose both taxes will be legally untenable. Ifthe appellant has been subjected to both taxes, the objection by the appellant is perfectly valid. However, the facts and the law involved in this case show in crystalline terms that is not so.

[11] I am in agreement with the above reasoning of the Special Commissioners. I am of the view, under the scheme of taxation in Malaysia, there is no possibility of an overlap between tax payable under the ITA and RPGT as the latter is only levied in a situation where ITA is not applicable. There is also no possibility for a taxpayer being liable to both taxes in respect of the same gain because under the definition of gain under RPGT, it refers to 'gain other than gain or profit chargeable with or executed from income tax.' Thus, if the gain is from the sale of an asset is found to be of an income nature, then the assessment cannot be under RPGT because such gain should be taxed under the ITA. Thus, there is no possibility of a tax payer being liable to both taxes on the same gain.

[12] In the instant case, what the respondent has done was that he has amended an assessment that he has made in respect of which he had collected the tax and has imposed another tax under a different Act. Thus, the question is, can the respondent after issuing an assessment under the RPGT, issued another assessment under ITA to replace the RPGT's assessment. The Special Commissioners were of the view that the respondent was not precluded from proceeding with an assessment under ITA after reviewing the earlier assessment made under RPGT. I agree.

[13] In *Bye (Inspector of Taxes) v Coren* [1988] STC 393, it was held as follows: **A**

> There was no rule of law preventing the inspector from proceeding with the income tax assessment after the capital gains tax assessment had become final and the alternative assessments were properly made.

[14] I am of the view the same principle is applicable in Malaysia. The **B** respondent is not precluded from raising the assessment under ITA after reviewing the earlier assessment made under the RPGT. To me, the respondent has the power to review or revise an assessment which include vacating an assessment on the ground that no real property gain tax is payable on the gains. Thus, where an assessment for RPGT was made and subsequently it **C** was discovered that there was no chargeable gain within the meaning of the RPGT and thus no real property gain tax is payable, the respondent can and must discharge the assessment. This is what exactly happened in this case. The respondent after imposing tax on the appellant under RPGT, discovered that the sale of the subject lands should be subjected to ITA and informed **D** the appellant accordingly. Thus, I am unable to accept the contention of the appellant that the assessment to income tax by the respondent is in law null and void.

ISSUE NO 2 **E**

[15] The contention of the appellant is that the subject lands were purchased for purposes of investment and the subsequent disposal was a realisation of capital asset and thus any gain should be charged to the RGPT and not to the ITA.

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[16] The Special Commissioners found the appellant to be a property developer and a dealer in land and the subject lands form part of its stock in trade and the disposal of the subject lands was its normal business activity and thus the gains are chargeable to income tax and not to real property gains tax. In determining the status of the subject lands, the Special Commissioners had **G** considered the relevant determining factors laid down in cases such as *Leeming v Jones* 15 TC 333, *E v Comptroller-General of Inland Revenue* [1970] 2 MLJ 117 and *NYF Realty Sdn Bhd v DGIR* [1974] 1 MLJ 182 and addressed the issues such as the intention, method of finance, alteration to the property, treatment to the account, location, period of retention, subject matter of transaction and **H** circumstances of realisation.

[17] I agree with the approach taken by the Special Commissioners in dealing with the status of the subject lands. With regard to the intention of the appellant in purchasing the subject lands, the evidence do not support the appellant's contention that the subject lands were purchased for investment. **I** The appellant's memorandum and article of Association described its business activities which include, amongst others:

A (i) to acquire by purchase, lease, exchange, hire or otherwise any land or property to any tenure or any interest in the same in Malaysia or elsewhere and to sell, lease, let, mortgage or otherwise dispose of such lands, houses, buildings and other property of the company.

B **[18]** It is clear from the above, that the appellant describes its business as a property development. In *Mount Elizabeth (Pte) Ltd v CIR* [1987] 2 MLJ 130 at p 139 it was held:

a company which describes its business as a property development or itself a property developer is prima facie carrying on the business of property development for sale and not for investment or for both.

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[19] Thus, the description by the appellant of its business in the Memorandum and Article of Association draws a prima facie presumption that the appellant was carrying on the business of property development and the onus is on the appellant to rebut the said presumption which the appellant D had failed to do so. In fact, the burden is on the appellant to prove that the subject lands were purchased for investment purposes, and such intention must be shown to have existed at the time of the acquisition of the asset. In this respect, the Special Commissioners made the following findings:

E The appellants have led absolutely no evidence to establish that the subject lands were purchased as a capital asset. What we have in evidence is the fact that when they found that they could not use the subject lands for housing development as that area had been earmarked as a 'green lung' zone they decided to construct a golf course on the lands (see para 6(5) and (6) of the Case Stated). The appellants led no evidence to show whether they had knowledge of this zoning at the time F when they made the first application. The logical inference is that they did not have such knowledge as otherwise they would not have made the application. The initial application for conversion of the subject lands for housing use is indicative of the purpose for which they were purchased. No evidence was also led on the intention with which the appellants embarked on the golf course project. A golf course can be constructed for outright sale when completed or for letting out. In G the case of the former it is a trading activity in the absence of evidence to show that the land was purchased as a capital asset, and the latter use is capable of amounting to an investment. We only have the submission of learned counsel that the appellants intended to carry on a separate business of providing recreation and leisure, to wit, by hiring out or renting golf course facilities together with a golf H club incurring expenses thereon and that the subject lands constituted the capital asset of the said separate business which would derive income from the charging of golfing or green fees etc and his array of authorities on the status of a golf course when it is finally built and rented out. We fully agree with the law enunciated in those cases. However, the appellants failed to adduce any evidence to support their contention. Not a single witness called by the appellants gave any I evidence to support the submission that they made. With regard to the plans for the golf course the only evidence adduced were the steps taken to get the subject lands ready for the construction of the course, its subsequent sale and the

successful completion of the course by the purchasers. Nothing was stated about the purpose for which the appellants intended to build the golf course. They ought to be aware that the question whether a profit realised on the sale of real estate is a realisation or change of investment or an act done in the carrying on of a business is to be determined in the light of the facts in each case.

[20] I have no reason to disagree with the above findings. The above findings are findings of facts, based on the evidence adduced before the Special Commissioners. I have no reasons to interfere. Thus, to me, the appellant had failed to adduce evidence that their intention to hold the subject lands were for long-term investment.

[21] The Special Commissioners also found that for the method of finance employed by the appellant in the purchase of the asset does not support the appellant's contention that it was purchase for an investment. I have no reason to disagree. This is because the appellant did not show that it had adequate long term financial facilities to enable it to keep the subject lands, bearing in mind, that the appellant had to borrow money to purchase the said land. This would also mean that they also have to borrow money to develop it in any form bearing the fact that the paid up capital of the appellant was only RM2.

[22] The Special Commissioner also found that the alteration made to the subject lands was significant to indicate a trading transaction. The Special Commissioner said:

In the appeal before us approval had been obtained for use of the land as a golf course. Substantial preliminary work was done making the land ready for building work to start. Thus it had been matured into a viable commercial enterprise. Such steps taken by a property developer and dealer in land will readily support a finding that it is trading. (See *Taylor v Good* 49 TC 277 followed in *Lower Perak Corporative Housing Society v DGIR* [1994] 2 MLJ 713). This assures greater significant in the light of the fact that the appellant disposal of the piece of land following a similar pattern. With regard to that piece of land the appellant obtained conversion of land for agriculture to building. They did some earthworks and got the building plan approved. They sold it without doing any physical development.

[23] I fully agree with the above findings. It clearly indicates that the appellant was trading in land.

[24] In conclusion, the Special Commissioners have given their reasons why they considered the appellant to be a property developer and a dealer in land and the subject lands form part of the appellant's stock in trade and the disposal of the land was the appellant's normal business activity and thus chargeable to ITA and not RGPT. There is no mistake of law made by the Special Commissioners which justify me to reverse their decision.

A **[25]** Accordingly the appeal is dismissed with costs.

Appeal dismissed.

Reported by John Paul Simon

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